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No. 93-2014

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

FOXMEYER DRUG COMPANY,

Petitioner,

v.

COOPERS & LYBRAND,

Respondent.

In re FOXMEYER DRUG COMPANY,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

and in the alternative

FOR COMMON-LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS TO HONORABLE DONALD E. ZIEGLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF IN SUPPORT OF PETITION

MARVIN S. SLOMAN
Counsel of Record
WILLIAM B. DAWSON
KAREN L. HIRSCHMAN
WILLIAM D. UNDERWOOD
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
214/855-3000
Telecopier: 214/855-1333

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REPLY BRIEF IN SUPPORT OF PETITION

I. Mandamus is the Only Available Means to Effectively Review the District Court's Order.

Coopers is simply wrong in its assertion that mandamus is inappropriate because the district court's order refusing to remand, or alternatively to abstain, can be reviewed following appeal from a final judgment. 28 U.S.C. § 1334(c)(2) expressly precludes review of mandatory abstention determinations through ordinary avenues of

appeal. Under § 1334(c)(2), mandamus is the only vehicle for obtaining review of mandatory abstention orders, either in the court of appeals or in this Court. This lack of opportunity for appellate review itself justifies exercising the Court's authority pursuant to 28 U.S.C. § 1651 to resolve the important federalism issues raised by the district court's order. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). Coopers itself recognizes that the absence of "opportunity for appellate review" justifies mandamus. (Brief in Opposition at 11-12)

It is true that the portion of the district court's order refusing to remand the action despite the absence of federal jurisdiction is reviewable on appeal from a final judgment. And, as Coopers points out, mandamus is ordinarily not available simply because a lower court has improperly exercised jurisdiction. (Brief in Opposition at 9-12) This is hardly the ordinary case, however. Here the jurisdictional error both subjects FoxMeyer (and the federal judicial system) to the extraordinary expense of a wholly unnecessary MDL proceeding, and, when coupled with the abstention ruling, turns the important congressional policy favoring state-court resolution of local (*i.e.* nonfederal) disputes on its head. The need to preserve this important policy justifies review of the district court's order by mandamus. *United States Alkali Exp. Ass'n v. United States,* 325 U.S. 196, 203-204 (1945).

Perhaps more importantly, given that a portion of the district court's order can only be reviewed by mandamus, the policy against piecemeal review of trial court determinations would not be implicated by also reviewing on mandamus the rest of the order at issue — especially when the rulings are so closely related as here. For these

reasons, review should be granted with respect to the entirety of the district court's order.

II. The District Court's Refusal to Abstain Undermines a Significant Congressional Restriction on the Exercise of Federal Bankruptcy Jurisdiction.

The district court ignored its mandatory obligation to abstain under 28 U.S.C. § 1334(c)(2). Section 1334(c)(2) was enacted in 1984 to limit expansive exercises of "related to" bankruptcy jurisdiction under 28 U.S.C. § 1334(b). The possibility that courts might exercise "related to" jurisdiction over actions only tangentially related to pending bankruptcies raised concerns over "a super court bankruptcy system . . . able to supersede any State court in this country." 130 CONG. REC. S17152 (June 19, 1984); S. REP. No. 98-55, 98th Cong., 1st Sess. 1, 18 (1983). Unable to agree on language that would expressly restrict "related to" jurisdiction, Congress instead enacted § 1334(c)(2) to protect against federal intervention in state court matters where no federal interest was implicated.[1]

The only federal interest that could justify an assertion of "related to" bankruptcy jurisdiction over state-law claims pending between nondiverse parties in state court is the interest in orderly administration of a pending bankruptcy. That interest would only be implicated if an untimely state-court adjudication of the action would

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[1]Of course requiring the district court to abstain would not correct an unconstitutional assumption of jurisdiction by the court. (*See* Brief in Opposition at 27) While this metaphysical point may have been lost on Congress in enacting § 1334(c)(2), Congress did recognize that an order abstaining in deference to state-court adjudication would have the same functional impact on an action as an order remanding or dismissing the action for lack of federal jurisdiction.

disrupt or delay the bankruptcy. If, however, the state court can promptly adjudicate the action, there can be no federal interest to justify the exercise of federal court authority. Section 1334(c)(2) thus provides that if the action "can be timely adjudicated, in a State forum of appropriate jurisdiction," the court's obligation to abstain is mandatory. FoxMeyer established in the district court that this case can be timely adjudicated in the state court where it was properly commenced, and neither the district court nor Coopers has ever contested the point.[2] Because the state court can timely adjudicate FoxMeyer's action against Coopers, there is absolutely no federal interest in preempting that adjudication. The district court thus had a mandatory obligation to abstain.

Coopers' Brief in Opposition largely ignores the abstention issue. Though Coopers states without analysis that mandatory abstention under § 1334(c)(2) does not apply in removed cases, the circumstances requiring abstention arise almost exclusively in the context of removed cases. The petition demonstrates that Coopers' interpretation in effect renders § 1334(c)(2) always inapplicable (Petition at 22). Rather than arguing the applicability of § 1334(c)(2), Coopers' principal response is instead that requiring abstention is a bad idea. (Brief in Opposition at 28-29) Congress thought differently, however, and Coopers' argument is addressed to the wrong forum. If § 1334(c)(2) is to be repealed, that is a decision for

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[2]Coopers now suggests, however, that because state *and* federal suits have been filed against it in seven jurisdictions, none of the state actions could be timely adjudicated. (Brief in Opposition at 28-29 n.12) This bizarre suggestion is flatly wrong on the record in this case, and is utterly at odds with the express language and manifest purpose of § 1334(c)(2).

Congress alone to make by new legislation, not the district court by vitiating the statute.

III. No Substantial Federal Interest Justified the Exercise of Jurisdiction by the District Court.

The same absence of any federal interest in this action that requires abstention also compels the conclusion that there is no basis for the exercise of federal subject-matter jurisdiction. Though Coopers suggests that the existence of a federal interest is irrelevant to whether federal question jurisdiction exists under Article III, section 2 of the Constitution (Brief in Opposition at 22), the Court has insisted from its earliest days of interpreting Article III that an action must implicate a substantial federal interest for such jurisdiction to exist. *Osborn v. Bank of the United States*, 22 U.S. 738 (1824). As Justice Frankfurter has written, "[i]f there is in the phrase 'arising under the laws of the United States' leeway for expansion of our concepts of jurisdiction, the history of Article 3 suggests that the area is not great and that it will require the presence of some substantial federal interest, one of greater weight and dignity than questionable doubt concerning the effectiveness of state procedure." *Textile Workers Union v. Lincoln Mills,* 353 U.S. 488, 483-84 (1957) (Frankfurter, J. dissenting).[3]

Even if the state court were unable to timely adjudicate the present action, there would nonetheless be no federal interest sufficient to support jurisdiction given the remote connection between this action and the pending Phar-Mor bankruptcy. The adjectives "hypothetical," "indirect,"

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[3]Though included in a dissenting opinion on an issue not reached by the majority, Justice Frankfurter's discussion of federal jurisdiction provides a particularly illuminating explanation of the limits of Article III federal question jurisdiction.

and "contingent" pose far more than a semantical dispute, as Coopers suggests (Brief in Opposition at 20-21) — they quite clearly describe why there is no substantial federal interest in this action. FoxMeyer's case against Coopers will have no direct effect on the Phar-Mor bankruptcy. A judgment in favor of Coopers would have no impact whatsoever, and a judgment in favor of FoxMeyer would not necessarily affect the bankruptcy. Phar-Mor is not a party to the action, nor is the status of any property of the estate being adjudicated here. The judgment ultimately entered in this action will have absolutely no direct impact on the Phar-Mor bankruptcy.

Coopers attempts to obscure this issue by reciting FoxMeyer's activities in the Phar-Mor bankruptcy and by confusing FoxMeyer's claims against Coopers in this action with Phar-Mor's separate claims against Coopers (Brief in Opposition at 2-5), along with vague predictions that timely state proceedings will somehow "frustrate" resolution of the Phar-Mor bankruptcy (Brief in Opposition at 29 n. 12). But ultimately Coopers can locate only one possible indirect impact a judgment in this action could have on the Phar-Mor bankruptcy: the possibility that a judgment in favor of FoxMeyer may satisfy FoxMeyer's bankruptcy claim against Phar-Mor. (Brief in Opposition at 18) For this indirect impact to occur, however, several contingencies must first occur (see Petition at 6). Although it is certainly conceivable that these contingencies might occur, not just any "conceivable" federal interest will suffice. Federal jurisdiction requires more than the "remote possibility" of a federal interest. *Lincoln Mills,* 353 U.S. at 482 (Frankfurter, J., dissenting).[4] For federal jurisdiction to exist a significant federal

[4]This constitutional restriction on federal jurisdiction is not altered by the fact that several circuits have adopted an "any conceivable effect"

interest must be *directly implicated* by the action. *Gully v. First Nat'l Bank,* 299 U.S. 109 (1936). In the present case there would be no direct effect.

Coopers concedes that any impact this action might have on the Phar-Mor bankruptcy is indeed subject to several contingencies, but argues that "sound jurisdictional doctrine" should not demand inquiry into the possibility of these contingencies arising (Brief in Opposition at 21). FoxMeyer agrees that the focus of the jurisdictional inquiry should not (and need not) be a detailed determination of the likelihood of these contingencies arising. But the solution is not, as Coopers suggests, to extend federal jurisdiction no matter how remote the federal interest.[5] Instead, mere hypothetical possibilities of effect should never suffice to satisfy the Article III, section 2 requirement of a substantial federal interest in an action. *Cf. Louisville & Nashville Railroad v. Mottley,* 211 U.S. 149 (1908). Only if the outcome of an action

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test for "related to" bankruptcy jurisdiction — a test apparently created by the authors of the Collier bankruptcy treatise without any consideration of constitutional limitations. Several lower courts, though acknowledging the any-conceivable-effect analysis, have limited "related to" jurisdiction to circumstances where an action will directly impact a pending bankruptcy. *See, e.g., Pacor, Inc. v. Higgins,* 743 F.2d 984, 994-96 (3d Cir. 1984).

[5]Opening the jurisdictional inquiry to the type of remote effect suggested by Coopers would lead to an unthinkable expansion of federal judicial authority. For example, Coopers suggests that returning this action to state court (where it properly belongs) would distract Phar-Mor officials called to testify in the state-court action and thereby affect the pending bankruptcy. (Brief in Opposition at 28) Were this so-called "federal interest" sufficient to support federal jurisdiction, however, every state court action where an official of a bankrupt party might be a mere witness could be removed as "related to" a pending bankruptcy. Under no legitimate constitutional philosophy can Article III, section 2 federal question jurisdiction extend this far.

would directly (and thus necessarily) impact a pending bankruptcy can the action "relate to" the bankruptcy within the meaning of 28 U.S.C. § 1334(b) as limited by Article III, section 2 of the Constitution.

Coopers also asserts that the Article III, section 2 jurisdictional inquiry is not ripe because "neither of the Courts below has addressed the constitutional arguments now put forward." (Brief in Opposition at 15) This assertion is incorrect for two reasons. First, as Coopers recognizes, where jurisdiction is questioned courts have "the power and the duty, subject to review to determine the jurisdictional issue." *See* Brief in Opposition at 10 (citing 13A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3536 at 535 (2d ed. 1984)). Second, the lower courts have necessarily addressed the jurisdictional question, because in the Third Circuit "related to" bankruptcy jurisdiction has been treated as extending to the limits imposed by Article III, section 2. *See Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984). These constitutional limits were thus considered when the lower courts decided whether this case "related to" the Phar-Mor bankruptcy within the meaning of 28 U.S.C. § 1334(b).

For the foregoing reasons, and for the reasons set forth in FoxMeyer's petition, the relief requested in the petition should be granted.

Respectfully submitted,

MARVIN S. SLOMAN
Counsel of Record
WILLIAM B. DAWSON
KAREN L. HIRSCHMAN
WILLIAM D. UNDERWOOD
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, TX 75201
Phone: (214) 855-3000
Telecopier: (214) 855-1333

Counsel for Petitioner, FoxMeyer Drug Company

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